

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

WILLIE MCNAIR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:06-cv-695-WKW-CSC
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants.	)	

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JAMES CALLAHAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:06-cv-919-WKW-CSC
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants.	)	

**DEFENDANTS' OBJECTION TO MAGISTRATE JUDGE'S ORDER  
FILED ON AUGUST 23, 2007**

The defendants hereby object to the Magistrate Judge's Order, see Doc. 86, that was entered on August 23, 2007. This objection is filed pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a).

The defendants filed a motion to compel the plaintiffs "to explain what changes must be made to Alabama's execution protocol in order to meet constitutional standards." Doc. 78 at 1. The plaintiffs filed an objection to this

request, see Doc. 83, and the Magistrate Judge entered an order denying the defendants' motion, see Doc. 86. The Magistrate Judge reasoned, among other things, that the defendants' motion was premature in that "the question of how to fix lethal injection protocols is not relevant until the plaintiff proves that the protocols are broken." Doc. 86 at 4.

The defendants hereby object to the Magistrate Judge's order and incorporate by reference their motion to compel responses to interrogatories. See Doc. 78. Defendants note that the standard at issue is whether the request is reasonably calculated to lead to the discovery of admissible evidence. The requests at issue meet this standard. For example, if plaintiffs claim that Alabama uses the wrong chemicals in lethal injections, the defendants can better defend themselves against that claim (and the Court can better assess that claim) by comparing the chemicals to those that plaintiffs believe should be used instead. And if the only procedures that plaintiffs would agree to be constitutional are so onerous that no State could possibly adopt them, that would tend to show that plaintiffs' real purpose is to block their execution, and this would support defendants' argument that the claim is in essence an improper successive habeas petition.

In addition, the defendants note that the plaintiffs' failure to suggest an alteration to Alabama's execution procedures, after asserting that there is such an

alternative method, turns the lethal-injection claim into a challenge against the sentence, a claim which sounds in habeas. See Hill v. McDonough, 126 S. Ct. 2096, 2101 (2006). The Supreme Court there ruled that “a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself.” Hill, 126 S. Ct. at 2101 (quoting Nelson v. Campbell, 541 U.S. 637, 644, 124 S. Ct. 2117 (2004)). The failure to suggest an alternative method, after asserting that there is one, “leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out.” Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007).

For the foregoing reasons, the defendants respectfully object to the Magistrate Judge’s order filed on August 23, 2007.

Respectfully submitted,

Troy King  
Attorney General

/s/ J. Clayton Crenshaw  
J. Clayton Crenshaw (CRE007)  
Assistant Attorney General

/s/ James W. Davis  
James W. Davis (DAV103)  
Assistant Attorney General

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2007, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to the following: **Stephanie L. Cohen, Vincent R. Fitzpatrick, Jr., Heather K. McDevitt, Randall Susskind, and Cathleen Price.**

/s/ J. Clayton Crenshaw

J. Clayton Crenshaw

Assistant Attorney General

#### **ADDRESS OF COUNSEL:**

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